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7                   **UNITED STATES DISTRICT COURT**  
8                   **SOUTHERN DISTRICT OF CALIFORNIA**

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10 DANIELLE DEMISON and TERI  
11 SPANO, on behalf of themselves, all  
12 others similarly situated, and the  
13 general public,

14                   Plaintiffs,

15                   vs.

16 WALGREEN CO. INC., an Illinois  
17 corporation; DOES 1-20, inclusive,

18                   Defendants.

19                   Case No.: 14-CV-0306-BTM-JLB

20                   **ORDER DENYING DEFENDANT'S**  
21                   **MOTION TO SEVER**  
22                   **PLAINTIFF'S CLAIMS**

23                   Defendant Walgreen Co., Inc. ("Defendant") has filed a Motion to Sever  
24 pursuant to Rules 20 and 21 of the Federal Rules of Civil Procedure. For the  
25 reasons set forth herein, the Court DENIES the motion.

26                   **I. BACKGROUND**

27                   Defendant is a Delaware corporation that conducts a substantial amount of  
28 business in the State of California. ¶6.<sup>1</sup> Plaintiffs Danielle Demison ("Demison")  
and Teri Spano ("Spano") allege that Defendants manufacture, label, advertise,

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1 Unless otherwise noted, all facts herein are taken from the Complaint (Doc. 1-2), all "¶" citations are references to paragraphs of the Complaint, and all references to a "Rule" refer to the Federal Rules of Civil Procedure.

1 distribute, and sell products labeled “Ear Pain Relief” and “Ear Ache Drops”  
2 throughout California and nationwide through retail stores and online. ¶¶32, 33.

3 In 2013, Demison purchased Defendant’s Ear Pain Relief product. ¶36.  
4 Beginning in September 2008 and continuing through December 2013, Spano also  
5 purchased Defendant’s Ear Pain Relief product. ¶40. Plaintiffs relied upon the  
6 product name, “Ear Pain Relief,” and label representations claiming the product  
7 was “homeopathic”, “relieves pain,” “quickly stimulates the body’s natural ability  
8 to relieve earache pain,” and statements that the product contained “Chamomilla  
9 10X . . . calmative, pain reliever,” “Mercurius solubilis 15 x . . . anti-  
10 inflammatory” and “Sulphur 12x . . . pain reliever, anti-itch.” ¶¶37, 41.

11 Additionally, Demison purchased Defendant’s Ear Ache Drop product in  
12 2013. ¶38. Beginning in September 2008 and continuing through December 2013,  
13 Spano also purchased Defendant’s Ear Ache Drop product. ¶44. Plaintiffs relied  
14 upon the product name, “Ear Ache Drops,” and label representations claiming the  
15 product was “homeopathic,” “relieves pain, calms irritability & soothes itching due  
16 to cold & flu, swimmer’s ear & allergy,” and statements that the product contained  
17 “Belladonna – 30C, Calcarea – 30C, Chamomilla – 30C, Lycopodium – 30C,  
18 Pulsatilla – 30C, Sulphur – 30C” as active ingredients. ¶¶39, 45.

19 Plaintiffs allege that Defendant’s primarily advertise and promote the  
20 products through the labeling claims and images on the front of the products’  
21 packaging, and that Plaintiffs and the purported class relied on such packaging  
22 claims in purchasing the products. ¶50. Plaintiffs claim that the purportedly active  
23 ingredients of the products are so greatly diluted as to be effectively non-existent,  
24 such that the products are ineffective for their intended uses. ¶52. Thus, Plaintiffs  
25 allege that Defendants’ assertions as to the products’ ability to relieve symptoms of  
26 ear pain are false, deceptive, and misleading. ¶¶53, 54.

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1 On December 31, 2013, Plaintiffs commenced this putative class action on  
2 behalf of themselves, all others similarly situated, and the general public, asserting  
3 the following claims: (1) violation of California Consumers Legal Remedies Act  
4 (“CLRA”) (Cal. Civ. Code § 1750, *et seq.*); (2) violation of California Unfair  
5 Competition Law (Cal. Bus. & Prof. Code §17200, *et seq.*); (3) violation of  
6 California Business and Professions Code §17500, *et seq.*; (4) breach of express  
7 warranty; and (5) breach of the implied warranty of merchantability. Defendant  
8 has moved to sever Plaintiff’s claims against its Ear Pain Relief and Ear Ache  
9 Drops products pursuant to Fed. R. Civ. P. 20 and 21. Defendants argue that  
10 severance is proper because Plaintiffs’ claims are based on different transactions  
11 involving different products, and raise different questions of law and fact.

## **II. LEGAL STANDARD**

Fed. R. Civ. P. 18(a) permits “[a] party asserting a claim . . . [to] join, as independent or alternative claims, as many claims as it has against an opposing party.” However, Fed. R. Civ. P. 21 permits a court, on just terms, to sever claims against any party. “The application of Rule 21 involves considerations of convenience and fairness.” SEC v. Leslie, No. C 07-3444, 2010 U.S. Dist. LEXIS 76826, \*10 (N.D. Cal. Jul. 29, 2010). The determination of whether to sever a claim under Rule 21 is within the discretion of the trial court “as long as there is a discrete and separate claim,” but “an attempt to separate an essentially unitary problem is an abuse of discretion.” Id. at \*10 (internal quotation marks and citations omitted). “In determining a Rule 21 motion, the court will consider: (1) whether the claims arise out of the same transaction or occurrence; (2) whether the claims present some common questions of law or fact; (3) whether settlement of the claims or judicial economy would be facilitated; (4) whether prejudice would be avoided if severance were granted; and (5) whether different witnesses and documentary proof are required for the separate claims.” Trazo v. Nestle USA,

1 Inc., 2013 U.S. Dist. LEXIS 171211, \*5 (N.D. Cal. Dec. 4, 2013) (quoting Leslie,  
 2 2010 U.S. Dist. LEXIS 76826, \*10).

### III. DISCUSSION

4 Defendant argues that severance is proper under Rule 21 because Plaintiffs'  
 5 claims are based on different transactions, different products, and raise different  
 6 questions of law and fact. Defendant further argues that severance will prevent  
 7 jury confusion and prejudice.

#### A. The Claims Arise From the Same Series of Transactions or Occurrences.

10 “[T]he ‘same transaction’ requirement . . . refers to similarity in the factual  
 11 background of a claim.” Coughlin, 130 F.3d at 1350; Bautista v. Los Angeles  
 12 County, 216 F.3d 837, 842-43 (9th Cir. 2000) (interpreting “transaction or  
 13 occurrence” to require “similarity in the factual background of a claim”). “There is  
 14 no bright-line definition of ‘transaction,’ ‘occurrence,’ or ‘series.’ Instead, courts  
 15 assess the facts of each case individually to determine whether joinder is sensible  
 16 in light of the underlying policies of permissive party joinder.” Walker v. Bryson,  
 17 1:11-CV-01195-AWI-SKO, 2012 WL 5186658, at \*4 (E.D. Cal. Oct. 16, 2012).

18 Bearing in mind the Rules’ “impulse . . . toward entertaining the broadest  
 19 possible scope of action consistent with fairness to the parties,” and encouragement  
 20 of “joinder of claims, parties and remedies,” United Mine Workers of Am. v.  
 21 Gibbs, 383 U.S. 715, 724 (1966), the Court turns to the factual background of the  
 22 Complaint. Both Plaintiffs purchased Ear Pain Relief and Ear Ache Drops  
 23 products labeled with Defendant’s logo at Defendant’s retail stores. While Spano  
 24 purchased the products as early as 2008, both Plaintiffs purchased the products in  
 25 2013. After utilizing both products in their individual capacities, Plaintiffs  
 26 concluded that the products were ineffective for their intended uses. While the  
 27 specific details of the individual purchases of the products are unique to each  
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1 transaction, the alleged facts follow the same pattern: the consumers read the labels  
2 and claims on the products' packages, and relied upon the claims to remedy ear  
3 pain. The Court finds a high degree of similarity in the factual background of  
4 these claims and concludes that each claim arises from the same series of  
5 transactions or occurrences.

6 **B. The Claims Involve Common Questions of Law or Fact**

7 A claim involving common questions of law or fact will satisfy the second  
8 prong of Rule 20. See Desert Empire Bank v. Ins. Co. of N. Am., 623 F.2d 1371,  
9 1375 (9th Cir. 1980); Coughlin, 130 F.3d at 1351 (finding no "common question of  
10 law or fact" when "each Plaintiff's claim is discrete, and involves different legal  
11 issues, standards, and procedures.").

12 Plaintiffs allege that Defendant's ear relief products were both advertised  
13 under Defendant's brand, sold in Defendant's stores, and contained active  
14 ingredients which were so diluted as to render them ineffective. Plaintiffs allege  
15 that the "pain relief" claims on the both products' labels was false, deceptive, and  
16 misleading. Plaintiffs advance the same causes of action for the sale of both  
17 products. These mutual issues of fact and law all weigh in favor of finding  
18 sufficient commonality to sustain the joinder of the claims.

19 Moreover, the Court rejects Defendant's arguments that severance is  
20 appropriate because each product was produced by a different manufacturer and  
21 each product had different ingredients. First, the existence of distinct  
22 manufacturers is not dispositive, particularly in light of the fact that Defendant  
23 placed its brand on both products and marketed and sold both products for the  
24 same medical purpose. Second, the inclusion of different ingredients in each  
25 product is equally unavailing. It is sufficient that both products were advertised as  
26 providing relief for ear pain and that both products' labeling was allegedly

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1 deceptive as a result of ingredient dilution. Moreover, two of the listed active  
2 ingredients, chamomilla and sulphur, are common to both products.

3 In light of the common questions of fact and law which predominate across  
4 the Plaintiffs' claims against both products, the Court concludes that there is  
5 sufficient commonality to withstand the motion to sever.

6 **C. Fundamental Fairness**

7 Even if the requirements of joinder have been satisfied, a trial court must  
8 also consider whether joinder of a claim ““comport[s] with the principles of  
9 fundamental fairness or would result in prejudice.”” Brighton Collectibles, Inc. v.  
10 RK Texas Leather Mfg., 10-CV-419-GPC-WVG, 2013 WL 2631333 (S.D. Cal.  
11 June 11, 2013) (quoting Coleman v. Quaker Oats Co., 232 F.3d 1271, 1296 (9th  
12 Cir. 2000)).

13 Defendant argues that severance is appropriate because of the risk of  
14 substantial prejudice and jury confusion. However, such assertions are premature  
15 and Defendant has not demonstrated how it will be prejudiced by maintaining the  
16 claims in a single action. Defendant’s vague assertion that the claims are  
17 superficially similar and will confuse a jury is speculative at this early stage in the  
18 litigation. See Walker, 2012 WL 5186658, \*9 (“Until further discovery has been  
19 completed and initial disclosures have been exchanged, Defendants' claims of  
20 prejudice are speculative and essentially unsupported.”). If any risk of substantial  
21 prejudice does arise, the Court can employ protective measures, such as careful  
22 jury instructions or separate trials, to prevent confusion. See Jacques v. Hyatt  
23 Corp., C 11-05364 WHA, 2012 WL 3010969, \*5 (N.D. Cal. July 23, 2012)); Fed.  
24 R. Civ. P. 42(b) (“For convenience, to avoid prejudice, or to expedite and  
25 economize, the court may order a separate trial of one or more separate issues,  
26 claims, crossclaims, counterclaims, or third-party claims.”). It is also unlikely that  
27 Plaintiffs’ two claims will necessitate extensive discovery that would burden  
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1 Defendant. To the contrary, the similarity of the products and claims will likely  
2 produce substantial overlap in discovery.

3 Accordingly, the Court finds that Defendant will suffer no substantial  
4 prejudice by allowing the claims to remain joined at this time. Further, allowing  
5 the suit to move forward will serve the ends of judicial economy and prevent the  
6 needless repetition created by two suits which raise similar facts and issues.

7 **IV. CONCLUSION**

8 For the reasons discussed above, Defendant's motion to sever is DENIED.  
9 Defendant shall file an answer to the Complaint within twenty days of the entry of  
10 this Order.

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12 **IT IS SO ORDERED.**

13 DATED: July 24, 2014

  
14 BARRY TED MOSKOWITZ, Chief Judge  
15 United States District Court

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